

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATE OF NEVADA
DEPARTMENT OF EDUCATION

In the matter of

STUDENT¹, by and through his
Parents

Petitioners,

v.

CLARK COUNTY SCHOOL DISTRICT

Respondent.

DECISION

Hearing Officer: Joyce O. Eckrem

Representatives:

Parents, for Petitioners

Phoebe Redmond, Esq., for Respondent

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed for public distribution.

1 On June 22, 2009, Clark County School District (CCSD or District) received a due
2 process complaint in the above-captioned matter. The hearing officer was appointed on
3 June 23, 2009. The parties participated in resolution; the resolution period ended on July
4 22, 2009. A status conference was conducted on July 27, 2009, and the hearing set for
5 September 21 and 22 to continue on October 12 and 13 if needed. A continuance was
6 requested by CCSD and granted for good cause to October 23, 2009 for the final
7 decision.

8 Petitioners acted without counsel. Father represented Petitioners throughout the
9 proceedings and was accompanied by Mother at the hearing.

10 Ms. Phoebe Redmond, Director, Compliance and Monitoring, and attorney-at-
11 law represented CCSD. Acting as the client was Mr. Michael Harley, Chief Compliance
12 Officer, Compliance and Monitoring. Ms. Wendy Hafenbreadl, Compliance Monitor,
13 also assisted Ms. Redmond.

14 The hearing was closed to the public at Petitioners' request. Witnesses were
15 sequestered with the exception of Mother who was a necessary participant in the
16 hearing.

17 The parties' documentary evidence was introduced at the commencement of the
18 hearing subject to later objections: P-1 THROUGH P-42, and D-1 through D-485. At the
19 conclusion of the hearing, CCSD removed four exhibits from the record, without
20 objection: D-6 and D-7 (resumes of witnesses not called) and D- 149 and D-150
21 (duplicative of D-158 and D-159.)

22 Petitioners called the following witnesses: Mother, Principal, and Psychologist.

23 CCSD called the following witnesses: Psychologist (joint witness), Principal (joint
24 witness), Itinerant Specialist, Teacher, Coordinator, Home Case Supervisor and Lead
25 Interventionist

26 CCSD refused to voluntarily produce Student's current teacher as requested by
27 Petitioners. Although given the opportunity to compel her attendance by subpoena,
28 Petitioners chose not to do so, fearing it could have an affect on Student's program. The

1 hearing officer does not see any prejudice to Petitioners. The current teacher could not
2 testify about events leading up to the June 19, 2009 IEP in dispute, which are the relevant
3 events.

4 After Petitioners completed examination of all their witnesses, but prior to recall
5 or rebuttal witnesses, CCSD moved for a directed verdict. The hearing officer ruled that
6 Petitioner had raised some questions for the hearing officer to deliberate, and that
7 although Petitioners bear the burden of persuasion, CCSD should at least finish its case
8 to show that its offer is appropriate.

9 The evidentiary hearing began on September 21 and was completed on
10 September 22, 2009. Having heard the witnesses, reviewed all the documentary
11 evidence and heard the parties' oral closing arguments, the hearing officer renders this
12 final decision.

13 I. ISSUE TO BE DECIDED

14 1. Does Student need the after-school autism therapy program provided by the
15 Low Incidence Training Program (Intensive Intervention Services Pilot Program) in
16 order to receive educational benefit?

17 II. APPLICABLE LAW

18 Students with disabilities have a right to the availability of a free appropriate
19 public education. 20 U.S.C. § 1400(d). The term "free appropriate public education"
20 means special education and related services that are available to the student at no
21 charge to the parent or guardian, that meet the standards of the state educational
22 agency, and conform to the Student's IEP. 20 U.S.C. § 1402 (9). "Special education" is
23 defined, in relevant part, as instruction designed to meet the unique needs of the
24 student. 20 U.S.C. § 1402 (29); NAC §388.115. "Related services" are defined, in relevant
25 part, to mean developmental, corrective and other supportive services as may be
26 required to assist a child to benefit from special education. 20 U.S.C. § 1402 (26); NAC
27 §388.101.

28 Each eligible student with a disability is entitled to an "individualized education

1 program," which is a written document, specially designed to meet a student's
2 individualized needs. 20 U.S.C. §§ 1402 (14), 1414 (d) (1). "The purpose of the IEP is to
3 tailor the education to the child; not tailor the child to the education." *Senate Report* 105-
4 17 on the IDEA Amendments of 1997 at 24 (1997).

5 Under the IDEA and the decision of the Supreme Court in *Bd. of Educ. v. Rowley*,
6 458 U.S. 176 (1982), an appropriate educational program must be designed to meet the
7 student's needs and reasonably calculated to provide the student with educational
8 benefit. The Court in *Rowley* concluded that the IDEA does not require school districts to
9 provide students with disabilities the best education available or to provide instruction
10 or services that maximize the student's abilities. The Court stated that school districts are
11 required to provide only a "basic floor of opportunity" that consists of access to
12 specialized instruction and related services, which are individually designed to the meet
13 the student's unique, needs and provide the student with educational benefit. *Id* at 207-
14 208. See also *Dept. of Educ., State of Hawaii v. Katherine D.*, 727 F.2d 908 (9th Cir. 1984)
15 [School districts are not required to maximize the potential of, or provide the best
16 possible education to, each student with a disability.]

17 To determine whether a school district has offered a student a free appropriate
18 public education the Court in *Rowley* established a two-part test: (1) has the district
19 complied with the procedures set forth in the Act, and (2) was the IEP reasonably
20 calculated to enable the student to receive educational benefit? *Id* at 206-207.

21 As to the first part of the test, compliance, the Ninth Circuit Court of Appeals has
22 held that while not all violations of procedural safeguards are significant, those
23 procedural violations that result in a loss of educational opportunity or seriously infringe
24 on the parent's opportunity to participate in the IEP formulation process may result in a
25 denial of a free appropriate public education. *W.G. v. Bd. of Trustees of Target Range Sch.*
26 *Dist.*, 960 F.2d 1479, 1483 (9th Cir. 1992). See also *Amanda J. v. Clark Co. Sch. Dist.*, 35
27 IDELR 65 (9th Cir. 2001); *M.L. v. Federal Way Sch. Dist.*, 387 F. 3d 1101 (9th Cir. 2004); *Van*
28 *Duyn v. Baker School District*, 502 F. 3d 811 (9th Cir. 2007). The 2004 amendments to the

1 IDEA require that a hearing officer determine a case on substantive grounds, and
2 address procedural compliance as follows:

3 In matters alleging a procedural violation, a hearing officer may find that a
4 child did not receive a free appropriate public education only if the
procedural inadequacies—

5 (I) impeded the child's right to a free appropriate public education;

6 (II) significantly impeded the parents' opportunity to participate in the
decision-making process regarding the provision of a free appropriate
public education to the parents' child; or

7 (III) caused a deprivation of educational benefits.

20 U.S.C. § 1415 (f)(3)(E)(ii).

8 As to the second part of the *Rowley* test—educational benefit—the analysis must
9 focus on the adequacy of the district's program. *Gregory K. v. Longview Sch. Dist.*, 811
10 F.2d 1307, 1314 (9th Cir. 1987). If a district's program addresses the student's unique
11 needs, provides educational benefit, and comports with the IEP, then the district has
12 offered a free appropriate public education even if the parents prefer another program
13 and even if the parent's preferred program would likely result in greater educational
14 benefit. *Id.* at 1314. The Ninth Circuit has also opined that the "actions of the school
15 systems cannot be judged exclusively in hindsight" and in determining the
16 appropriateness of an IEP one must consider what was and what was not "objectively
17 reasonable...at the time the IEP was drafted." *Adams v. State of Oregon*, 31 IDELR 130 (9th
18 Cir. 1999). A party dissatisfied with a proposed educational plan may challenge it in an
19 administrative hearing in which that party bears the burden of proving the plan to be
20 inadequate. *Schaffer ex rel. Schaffer v. Weast*, 126 S. Ct. 528, 537, 163 L.ED 2d 387 (2005).

21 III. FINDINGS OF GENERAL FACTS

22 Student is a six-year-old male who is eligible for special education and related
23 services as a student with autism. [D-27, D-30] His cognitive skills are estimated to be
24 low (e.g., the lower 0.1 percentage, standard score 50, on the Developmental Profile 3),
25 however any accurate measure is impeded by his lack of pointing and other
26 responsive/communication skills. [D-35, Testimony of Psychologist, Transcript, *passim*]

27 He has received special education services from CCSD in the Early Childhood
28 Preschool Program for students with autism since at or about the age of three.

Specifically, he attended the KIDS program (Kids Integrated Delivery System) at Elementary School until the current school year. At any given time there were three adults in the classroom with approximately five children. [D-25, D-31, Testimony of Teacher]² In addition to a program of special education in the KIDS classroom [D-100, D-125, D-161], Student has received speech and language services and occupational therapy as related services [D-101, D-126, D-162], and supplementary aids and services [D-103, D-128, D-164] Student has made progress during his preschool years, but it has been slow and inconsistent. [D-39, D-41, D-99, D-124, D-157, Testimony of Teacher, Psychologist, Lead Interventionist and Home Case Supervisor]

On or about June 27, 2008, Student began participation in CCSD's Intensive Intervention Services Pilot Program as a supplementary service for up to 40 hours per month. [D-165] This program uses applied behavioral analysis (ABA) and discrete trial training (DTT) as its core methodology.³ It is an "after-school" program, delivered in a variety of settings including the home and Low Incidence Disabilities Team offices. It requires parent participation; and includes monthly "clinics" where progress, skills, techniques and other matters are demonstrated to and/or discussed with the parents. The purpose of the program is to provide intervention to address "learning to learn" behaviors with the goal of transferring students to school-based programs prior to the age of eight.⁴ [P-27-30; Testimony of Coordinator, Itinerant Specialist, Transcript *passim*]

Beginning in April 2009, a Deliberation Team Member⁵ began collecting data as part of Student's annual IEP review process to determine the continued need for the

² Student is now 6 years of age, no longer eligible for "early intervention" services, and is being served as a first grade student in a self-contained classroom designed to meet the needs of students with autism. (Testimony of Coordinator, Principal)

³ This methodology is also used in the KIDS program. [Testimony of Teacher, Principal, Transcript *passim*]

⁴ Since students, as in this case, are typically attending a school-based program for 30 hours a week in addition to the home program, "transferring to a school-based programs" means they receive the school-based program only.

⁵ Deliberation Team Members are part of the Low Incidence Disabilities program of CCSD and are responsible, *inter alia*, for collecting information that is reported to the IEP team to deliberate a student's need for the initiation, continuing or discontinuing the Intensive Intervention Services Pilot Program for a student. [Testimony of Coordinator and Itinerant Specialist]

1 Intensive Intervention Services Pilot Program. She determined that the program had not
2 had a significant effect on Student's rate of acquiring skills and adaptive behaviors and
3 concluded that the data did not support continuation of the program. She
4 recommended, in relevant part, that Student be transitioned to school based services
5 only. [D-184-187, Testimony of Itinerant Specialist]

6 On June 19, 2009, the IEP team met and the public members of the team agreed
7 with the Deliberation Team Member's recommendation, providing a transition period to
8 the school-based program only. [D-180, Testimony of Psychologist, Teacher, Principal]
9 Parent disagreed and requested this due process hearing. Student has remained in the
10 program under the "stay-put" provisions throughout these due process proceedings.

11 **IV. FINDINGS OF MATERIAL FACTS AND CONCLUSIONS OF LAW**

12 *Contentions of the parties*

13 Petitioners contend that CCSD's recommendation to remove Student from the
14 Intensive Intervention Pilot Program is tantamount to giving up on him. They suggest
15 that the data on Student's progress could be wrong, and that Student's lack of
16 anticipated progress in the home program could be attributed to any number of events
17 such as: being abused and humiliated at school; lack of communication and consistency
18 between/among the parents, home and school staff; staff attitudes toward Student;
19 and/or staff attendance at the home sessions. Parents contend that they have noted
20 improvement in the home environment and that Student is entitled to the program, not
21 only based on his needs, but upon the representations of district staff that he would
22 remain in the program until the age of eight.

23 CCSD contends that the Intensive Intervention Pilot Program is designed to give
24 students a "boost" in acquiring learning-to-learn skills and is intended as a short-term
25 program to supplement a child's classroom program. They contend that, based upon
26 peer-reviewed research, students who benefit from the program show a more rapid
27 rate of increase in skill acquisition and generalization to the classroom setting than did
28 Student. CCSD maintains that it has not given up on Student; that he continues to

1 receive 30 hours per week of programming in the school setting in accordance with
2 “best practices” and peer reviewed research. However, they contend that Student’s
3 continued slow rate of skill acquisition demonstrates that the intensive intervention
4 services did not impact his rate of learning and supports the IEP team’s recommendation
5 to discontinue these services in that he does not need them in order to benefit from his
6 education.

7 *Material Findings, Analysis and Conclusions*

8 To determine whether Student needs the Intensive Intervention Pilot Program,
9 the hearing officer reviews the evidence primarily under the “benefit” prong of the
10 *Rowley* (above) analysis: What are the Student’s needs; was the district’s offer designed
11 to meet those needs; and was the offer designed to confer educational benefit? Because
12 the Petitioners are not challenging the remainder of the IEP, the essential question for
13 the hearing officer to answer is: Did Student receive the *same benefit before the Intensive*
14 *Intervention Services were added as he did after these serves were added?*

15 1. Student’s Needs

16 Petitioners do not dispute the present levels of performance (assessed needs)
17 included in the IEP dated 2/27/09, and these are therefore adopted by the hearing
18 officer.⁶ [D-153-156] Specific to “learning-to-learn” skills, Student’s cognitive skills are
19 estimated to be low. [See Findings of General Facts, above] Student has poor eye contact
20 and engages in self-stimulatory behavior (internal such as gazing, and external such as
21 hand-flapping), interfering with his ability to imitate behaviors, attend to tasks and to
22 appropriately engage in social situations. He has limited communication skills, and his
23 speech production is more in the nature of echolalia than spontaneous communication.
24 Student does not engage in spontaneous social interaction or play with his peers. He is
25 highly prompt dependent.

26 He acquires skills at a very slow rate. Retention and generalization of skills are

27 _____
28 ⁶ The disputed IEP of 6/19/09 did not amend the present levels of performance, goals, objectives,
benchmarks, related services, or most supplementary aids and services. The only change was the
discontinuation of the Intensive Intervention Services Pilot Program.

1 inconsistent.

2 [D-184-187; Testimony of Psychologist, Teacher, Home Case Supervisor, Lead
3 Interventionist.]

4 Student requires continual small-group instruction for basic literacy skills, and
5 extensive one-on-one instruction in some academic areas. He needs speech and
6 language therapy to orally communicate and socialize with his peers, and occupational
7 therapy. He requires a special day class setting (with some opportunities for interaction
8 with typical peers), with a positive intervention support plan throughout the school day.
9 [D-152-168]

10 2. CCSD's Offer

11 The 2/27/09 IEP, with the exception of the supplemental intensive intervention
12 services in the home, is CCSD's offer of special education and services to Student for the
13 2009-10 school year. Under this IEP, his goals and objectives are implemented in a special
14 self-contained program, using principals of ABA and DTT with positive reinforcement.
15 Student has a positive behavior intervention support plan that is to be implemented
16 throughout the school day. In this setting he receives direct instruction in
17 communication, behavioral, self-help, gross motor, fine motor and cognitive/readiness
18 skills. He also receives speech and language and occupational therapies in the classroom
19 and/or school campus. Several modifications and supports are provided to supplement
20 his classroom program. His goals, objectives and benchmarks include pre-academic and
21 fine motor skills, social interaction, classroom behavior, and communication and
22 language skills. Student also participates in activities with his typical peers. This IEP
23 includes extended school year service [D-152-168; see also testimony of Coordinator]
24 Petitioners do not dispute the appropriateness of these IEP components. Their
25 contention is that Student cannot benefit from this IEP without the Intensive
26 Intervention Services Pilot Program.

27 The Intensive Intervention Services Pilot Program at issue is based upon "best
28 practices" and peer reviewed research. It is intended to be a short-term program. Its

1 purpose is to provide a quick “boost” in acquiring skills necessary to access the
2 classroom program, and a quick return to classroom-based instruction only. CCSD’s
3 experience with the program and published research indicate that low cognitive ability
4 and absence of language are good predictors of limited progress in such intensive
5 intervention programs, whereas rate of learning, imitation and social relatedness predict
6 favorable outcomes in such programs. In other words, children who are functioning at a
7 low cognitive level and have a slow rate of skill acquisition—like Student—do not
8 typically demonstrate benefit from such intensive interventions. [Testimony of
9 Coordinator; Transcript, *passim*; D-440-461, D-481-485] The program is supplemental to
10 the classroom program, and the Intensive Intervention Services staff work on the IEP
11 goals, as do the classroom staff. [D-165; Transcript, *passim*]

12 Again, in deciding this case, the question for the hearing office is: Did Student
13 receive the *same benefit before the Intensive Intervention Services were added as he did after*
14 *these serves were added?*

15 3. Educational Benefit

16 Teacher’s testimony is persuasive on Student’s rate of skill acquisition. Student
17 has attended her KIDS classroom for three years. Her testimony revealed that she was
18 very knowledgeable about Student’s skill development during these three years, and
19 knowledgeable about how she worked on each of Student’s goals and objectives
20 throughout the day.

21 When initially enrolled at age three, Student needed a prompt for everything. He
22 did not point, needed hand-over-hand assistance, did not eat with a spoon, did not put
23 on his shoes, was not toilet trained, and could not independently transition from one
24 activity to another. He had no typical communication and could not make his needs
25 known. He needed help in all areas. In academics, Teacher was at first unable to get
26 responses. Socially, he did not play with other children or otherwise acknowledge their
27 presence. He did not notice when the other children left the area and needed prompting
28 to move to the next activity area. Emotionally, Student presented no serious behavior

1 problems. However, upon initial enrollment he cried a lot. Although this is typical of
2 young children with autism, Student struggled getting through this phase. [Testimony
3 of Teacher]

4 For three years, beginning with getting off the bus, through breakfast, circle time,
5 center time (one-on-one instruction or small group instruction) lunch, playground and
6 getting on the bus at the end of the day, Teacher and other classroom staff engaged
7 Student in activities designed to address his IEP goals, objectives and benchmarks.
8 Teacher uses ADA and DTT throughout the day. Teacher used DTT, a system of trial-by-
9 trial, with three levels of positive reinforcers: A reinforcers (highly desirable by Student)
10 when Student responded appropriately, B reinforcers (less desirable) when he
11 responded appropriately but at a slower rate than targeted, and C reinforcers
12 (something Student did not care for that much) when his responses were inaccurate.
13 [Testimony of Teacher] Principal's testimony was persuasive that Teacher followed the
14 district's ABA methodology and engaged the students in her classroom. He observed
15 classrooms, including Teacher's, on a weekly to two-week schedule, and observed
16 Teacher using DTT and positive reinforcers. [Testimony of Principal]

17 After three years in Teacher's classroom, Student's acquisition of skills has been
18 slow, minimal and notably inconsistent. By June of 2009, he would speak⁷ if prompted,
19 but his use of words is more like echolalia than spontaneous speech. For example, at
20 breakfast or lunch, Teacher worked on getting him to say "open." When he would not
21 do so, she would ask another child, "What does Student want?" The other child would
22 say "open" and then, on occasion, Student would mimic the other Student. He will now
23 hand the item to be opened to the adult, but does not spontaneously use speech to ask
24 to have it opened. He can make some needs known, e.g. water. From time to time,
25 throughout the three years Student was in her classroom, Teacher would attempt to use
26

27
28 ⁷ "Speak" is used in the relative sense here. There is no evidence that Student uses sentences or engages
routinely in spontaneous speech with others. He is still at the level of being taught to identify common
objects and use single words to express his needs. He will sometimes repeat words with prompts. [D-153]

1 the PECS⁸ communication system with Student, but he showed little interest in it in the
2 classroom. Teacher has also used a "six-way-talk" board with Student, where if he
3 pushes the appropriate button the board will repeat the word, reinforcing the Student's
4 touching response. This too was unsuccessful and Student would typically use a whole-
5 hand response (rather than touching with one finger) or grab with both hands, and not
6 look at the device when responding. Teacher reports that Student is toilet trained in that
7 Parents indicate he uses the bathroom at home. Though he does not go to the bathroom
8 during school hours, he does not have accidents at school. He does go into the
9 bathroom at school at appointed times and has learned to pull his pants up and down
10 and can go to the sink and wash his hands. [cf D-31] After three years, he has learned to
11 hang-up his backpack when coming in from the playground in the morning, though not
12 always in the right cubby, and he often needs reminders of where to place it by the
13 fence upon arrival, though this has been the routine for three years. Student now will
14 notice when the other children have left for the playground and follow them out,
15 though he still needs prompts for most classroom transitions. He can use some
16 playground equipment by himself (i.e., without physical help) though he still requires
17 prompting from time to time (e.g., will stop on the steps and needs prompting to
18 continue.) He does some parallel play, but does not play *with* other children or
19 acknowledge their presence. Matching has always been a strength and Student has
20 moved from insert puzzles to regular puzzles, though again, his responses are
21 inconsistent. He still prefers finger foods, but he will use a spoon if the item is withheld
22 until he does so. He can get off the bus by himself, though he still does not alternate
23 steps. Student will not make food choices consistently at lunch without prompts and
24 needs prompts to throw the waste in the trash. He can put his name on the board when
25 it is handed to him. Although Teacher is convinced he can recognize his written name,
26 he does not demonstrate consistency in doing so. He recognizes a few letters, but

27
28 ⁸ PECS is a communication tool where pictures are collected for the Student (water, food, other common objects or activities) and a Student learns to point at the pictures to communicate needs, wants, etc.

1 inconsistently. He does not write.⁹ Initially he would not tolerate “hand-over-hand”
2 assistance; he will now tolerate that. He can color (i.e., move the crayon on the paper),
3 but eats the crayons. Student is overweight and his chubby fingers interfere with his
4 fine-motor skills. He has completed one-step directions (e.g. “go to” or “sit”) and is now
5 working on two-step directions (e.g. “go to the red table and sit”) but often needs
6 prompts on the second part. Student does not cry as he did when he first entered the
7 program but will still do so when asked to do something he doesn’t want to do as a
8 means of avoidance. When he began visiting the regular kindergarten classroom for
9 circle time, his crying behavior recurred. He still engages in self-stimulatory behaviors
10 that interfere with his ability to learn. He does not consistently respond to reinforcers
11 and it is difficult to find reinforcers that work with Student (e.g., he likes Cheetos, but
12 after two he is no longer interested.)

13 During the 2008-09 school year, Student received the intensive intervention
14 services in the home program in addition to the classroom program. Teacher noted no
15 difference in his rate of skill acquisition, retention, or prompt dependency.¹⁰

16 [For the above findings, see Teacher’s testimony; D-110-111; D-462; 137-144; and see D-
17 96-98, D-122-123 and D-153-156]

18 The testimony and data of the home program staff members are consistent with
19 Teacher’s observations and testimony and confirm the persuasiveness and credibility of
20 the Teacher.

21 The Home Case Supervisor has been involved with Student’s home program
22 since October of 2008. She supervises and works in collaboration with the staff that
23

24 ⁹ There was testimony that Student spontaneously wrote several letters on one occasion, but there is no
25 evidence that this is a behavior that he does routinely or at appropriate times (e.g., during writing
times when asked to do so.)

26 ¹⁰ Various witnesses testified that Student has been receiving the home program for a year-and-a-half.
27 At the time the hearing was conducted, this appears accurate in that Student remained in the program
28 throughout these proceedings under the stay-put provisions. The documentary evidence indicates
Student started the program in June, 2008. [cf D-103 and D-129] However, even the documentary evidence
is conflicting. [See, e.g., D-184, first paragraph] For purposes of this decision, the relevant evidence on
the effect of the program is from its apparent initiation in June 2008 to June 2009 when the IEP team
recommended its discontinuance.

1 conduct Student's program in the home. She also collaborates with a consultant from
2 Autism Partnership, the agency with which CCSD contracts to provide training, design
3 and consultation in carrying out the Intensive Interventions Services Pilot Program. Her
4 duties include collecting data, developing behavioral programming for individual
5 students in the home program based upon a student's IEP, and consulting with,
6 advising, providing feedback to, and supervising staff during the in-home therapy
7 sessions. She also participates in the monthly clinics with parents, and prepares quarterly
8 reports on student progress. She performed all of these duties with respect to Student's
9 home program. Her testimony and conclusions comport with those of Teacher's:
10 Student's progress has been minimal. She has worked with approximately 10 other
11 children with autism and has seen their rate of skill acquisition increase substantially
12 within 9 months of the home program initiation. She reported the same inconsistencies
13 as Teacher in Student's performance, and noted that he had "good days and bad days."
14 [Testimony of Home Case Supervisor; D-193-195 and D-196-198]

15 The Lead Interventionist delivered direct sessions to Student in the home,
16 beginning in June of 2008. Although she was not assigned to him all year, she worked
17 with him on-and-off throughout the 2008-09 school year, either as his lead
18 interventionist, as a substitute or on make-up sessions when regular sessions were
19 missed. Her testimony was also consistent with Teacher's. Student is highly prompt
20 dependent; his acquisition and retention are inconsistent—from day to day, week to
21 week, etc. One day she will "think he knows a skill, the next it's like teaching him for the
22 first time." She has worked on "hi" and "bye" since the beginning. He does not
23 generalize the greetings to when someone enters or leaves the room, i.e., he still needs
24 prompts. Sometimes he will say "Hi, Ben" instead of an appropriate greeting to another
25 person. He will independently produce "tickle" (he enjoys being tickled.) His sound
26 production is not distinct, and again inconsistent. He engages in self-stimulatory
27 behaviors that interfere with his attention and ability to learn. Lead Interventionist has
28 also worked with other student's with autism and reports that with many others, the

1 rate of skill acquisition increases within weeks or months.¹¹ [Testimony of Lead
2 Interventionist]

3 Like Teacher, neither the Home Program Supervisor nor Lead Interventionist has
4 noted a difference in Student's rate of skill acquisition, retention, or prompt dependency
5 as a result of his inclusion in the Intensive Intervention Services Pilot Program.

6 Itinerant Specialist also confirmed the persuasiveness and credibility of Teacher's
7 testimony. As a Deliberation Team member in the Low Incidence Department, she
8 began collecting data and other information on Student in April 2009, as part of
9 Student's annual IEP process. The purpose of her review was to determine if Student
10 required continuation of the Intensive Intervention Service Pilot Program and to make
11 recommendations to the IEP team. In conducting her review and preparing her report
12 she relied upon direct observation; data collected, and testing done, by school staff;
13 Multidisciplinary Team (MDT) reports; and trial-by-trial and session data, and quarterly
14 reports collected by the Intensive Intervention Services staff.

15 Her report and testimony are consistent with the testimony of Teacher, Home
16 Case Supervisor and Lead Interventionist, above. Analysis of data collected by the
17 school staff for her report indicates that in the area of Communication Temptation
18 (defined as making a reasonable approximation of simple words to express desires)
19 Student attempted communication on an average of 26% of the time. In the area of
20 Compliance (defined as responding to instruction) Student responded 62% of the time.
21 She indicated that to demonstrate that the program was making a difference, one would
22 expect to see higher response percentages. Itinerant Specialist noted that the quarterly
23 reports reflected minimal and slow progress in attending and compliance. She noted that
24 his rate of skill acquisition is slow and minimal and that he is significantly prompt
25 dependent. She concluded that the "Intensive Intervention Services have not proven to

26 ¹¹ Lead Interventionist has been assigned to Student during his stay-put placement and some of her
27 testimony included Student's performance during this period, after the 6/19/09 IEP and the filing of this
28 request for a hearing. The hearing officer relies on her testimony to the extent it covers the periods prior
to the above IEP. To the extent there is any confusion over the time periods to which she was testifying,
there is no prejudicial affect. Student's performance has not changed during the period of stay-put.

1 be significantly effective in rate of acquisition of skills and adaptive behaviors” and that
2 “[t]herfore continuation of the IIS is not supported.”

3 [Testimony of Itinerant Specialist; D-184-187; see also D-203, D-214-239, D-276-286,
4 D-289-439]¹²

5 Petitioners presented several reasons why Student should continue in the home
6 program.

7 First, Mother testified that staff members told her that Student would continue in
8 the program until the age of eight. She also relied upon paragraph 25 of an “agreement”
9 provided to Parents upon Student’s entry into the program that states: “By the Student’s
10 8th birthday, services will be transferred to an Autism Spectrum Service Plan.” She also
11 interpreted this “agreement as a contract, relying upon the signatures of Father and a
12 CCSD representative. The hearing officer is not persuaded. There was no corroborative
13 evidence that any staff member told Parents that Student would continue in the
14 program until age eight. Coordinator denied under oath that she told the Parents the
15 program would be in place until the age of eight, and her demonstrated knowledge of
16 the purposes and practices of the program convinces the hearing officer that she did not.
17 The “agreement” is written in general terms, as an information sheet to parents
18 generally to inform them of the purposes of the program and their obligations as
19 parents. The “agreement” in question begins by stating the purpose of the program as
20 providing “intervention...to address learning to learn behaviors with the goal being to
21 transfer students to school based services only, *prior to* or by the age of eight.”

22 [Emphasis added] In addition, paragraph 6 of the “agreement” states that “programs
23 will be reviewed as part of the IEP process” and that “[d]etermination of continued need
24 for IIS will include a discussion of student’s acquisition of learning to learn behaviors....”

25 The 6/27/08 IEP adding the service indicates a review in six months. [Testimony of

26
27 ¹² The reader is cautioned that these data sheets cannot be read *individually* to draw conclusions about
28 how well Student is performing over-all. Rather, each is a snapshot of what Student did at a given
moment in response to instruction. *As a whole* they support the testimony of classroom and home staff of
the inconsistency in Student’s performance from day to day or session to session, and slow and minimal
skill acquisition.

1 Mother, Testimony of Coordinator; P-27-31, D-129] While the hearing officer
2 understands that parents are often overwhelmed with various written notices, IEPs and
3 other paper work received from districts, CCSD cannot be held responsible for Parents'
4 less than careful reading of the "agreement." Coordinator personally went over the
5 "agreement" with Parents, and Father attended the IEP meeting where initiation of the
6 services was discussed. [Testimony of Coordinator; D-104] Moreover, promising a
7 parent the continuation of services beyond a school year would be inconsistent with the
8 IDEA, which requires an annual review of IEPs. [34 C.F.R. § 300.324(b)] A
9 preponderance of the evidence demonstrates that Parents knew, or should have known,
10 that the program was to be reviewed and that continuation would be based upon
11 Student's progress and the deliberations of the IEP team.

12 Petitioners also tried to establish that the conduct of CCSD staff may have been
13 responsible for Student's failure to demonstrate that he was benefiting from the
14 program.

15 They attempted to cast doubt on the accuracy of the data relied upon. However,
16 the "data is what it is." [Testimony of Coordinator] The hearing officer recognizes that
17 data is only a snapshot in time, and is subject to recording error. However, CCSD staff
18 responsible for recording data receive substantial and on-going training in data
19 collection. [Testimony of Lead Interventionist] Furthermore, the data was credibly
20 corroborated by Teacher's observations, as well as the observations of the Psychologist
21 and other staff members. In addition, the report submitted to the IEP team on 6/19/09
22 [D-184-187] was thoroughly discussed by the team, and included information from a
23 variety of sources.

24 In two other instances Petitioners attempted to establish that staff observations
25 were incorrect. With Lead Interventionist Petitioners attempted to establish that
26 Student's failure to produce "banana" a word that he has know for some time, could be
27 due to an ear infection. In another instance, Petitioners tried to establish that hitting a
28 target with a ball without looking at the target could mean he has exceptional peripheral

1 vision rather than just luck. Petitioners failed to produce evidence, however that in the
2 “banana” incident Student had an ear infection, nor did they produce any evidence that
3 Student has exceptional peripheral vision. Petitioners bear the burden of proof and the
4 hearing officer cannot make a ruling based on supposition or hypotheticals. The hearing
5 officer is not persuaded that the data as a whole are inaccurate or that the IEP team
6 relied upon inaccurate information or misused the data in arriving at their decision.

7 Petitioners also attempted to establish that the poor attendance of one
8 interventionist, and the frequent days of no school (e.g., staff development days,
9 holidays, etc.) resulted in Student’s lack of progress and poor retention of skills. Indeed,
10 credible testimony established that one interventionist, who did not testify, may have
11 missed up to three weeks of sessions. [Testimony of Home Case Supervisor] However
12 the evidence also established that make-up sessions were provided. Petitioners
13 presented no evidence demonstrating the effect of the interventionist’s absences on
14 Student performance. Petitioners presented no evidence that days off from school
15 negatively affected Student’s rate of acquisition or retention. Petitioners failed to meet
16 their burden of persuading the hearing officer that attendance of Student or staff
17 affected Student’s program.

18 Petitioners did establish that there is no regular communication between the
19 school and home program staff members. For example, Petitioners did establish that
20 Student uses PECS in the home program. Parents requested several times that the home
21 program staff meet with Teacher and train her in the use of PECS. Teacher did not recall
22 conferring with staff from the home program.¹³ The Lead Interventionist and Home
23 Case Supervisor admitted that there was not regular communication between the home
24 and school programs. While this lack of communication is of concern to the hearing
25 officer, Petitioners did not establish that it contributed to Student’s lack of progress. The
26 hearing officer is persuaded by a preponderance of the evidence that both programs

27
28 ¹³ Teacher did use PECS in her classroom. She indicated that Student was not responsive to PECS in the
classroom setting. [Testimony of Teacher]

1 used the same principles of ABA, DTT and positive reinforcement with Student. Both
2 relied upon the goals and objectives in Student's IEP to determine skills to be addressed.
3 In each setting, Student's responses to instruction were inconsistent, i.e., there is no
4 evidence that Student responded to PECS consistently and correctly in the home
5 program, or that specific reinforcers (other than perhaps "tickle") routinely worked with
6 Student and should have been shared with the other program staff. Petitioners did not
7 establish by a preponderance of the evidence that lack of communication contributed to
8 Student's failure to acquire skills at a more rapid rate. [Testimony of Coordinator;
9 Transcript, *passim*]

10 Petitioners also attempted to establish that inappropriate teaching methods, and
11 humiliation and abuse could have contributed to Student's lack of progress. [Testimony
12 of Mother]

13 Mother testified that Student was sent home with his shoes untied and the tongue
14 askew, causing a safety issue for Student. [P-1] Teacher explained that Student was
15 unable to put on his own shoes, and that on the occasions when he was sent home with
16 his shoe improperly secured and tongue askew, he had put his own shoes on. She
17 explained that they praised Student for his effort, and that having an adult fix the shoe
18 would be teaching the Student "learned helplessness." The evidence does not establish
19 inappropriate teaching methods. Rather it establishes a disagreement between Parents
20 and Teacher and perhaps, a communication problem. (Testimony of Teacher, Testimony
21 of Principal] The evidence of a bruised toe does not establish that this was caused by
22 shoes not properly secured; nor did Petitioners establish that the bruise interfered in any
23 way with Student's learning. [P-2]

24 Similarly, through hearsay evidence only, Petitioners attempted to establish an
25 incident where Student pulled his pants down on the playground, another parent
26 reported that the adults were laughing at him. Petitioners did not establish that this
27 incident caused Petitioner humiliation or interfered with his ability to participate or
28 benefit from his program. [Testimony of Principal, Testimony of Teacher] On another

1 occasion, Student came home with a bruise on his chest. [P-3] Petitioners failed to
2 establish what caused the bruise. There is no evidence that Teacher disliked Student or
3 abused him in any way. [Testimony of Psychologist, Testimony of Teacher, Testimony
4 of Principal]

5 Petitioners also attempted to establish that Teacher failed to regularly send home
6 daily notes as required by the IEP. [Testimony of Mother; D-164] Petitioners produced
7 13 of the daily logs from Teacher. Seven of which were not filled out. [P-15-21] The
8 remainder had brief notes about Student's day. Even assuming that failure to send home
9 completed notes every day was a compliance problem, Petitioners failed to prove that
10 the child's right to a free appropriate public education was impeded, that the parents
11 opportunity to participate in the decision-making process was significantly impeded,¹⁴
12 or that it caused a deprivation of educational benefits [20 U.S.C. § 1415 (f)(3)(E)(ii); *N.B. v.*
13 *Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1208 (9th Cir. 2008)] Specifically, Petitioners
14 did not demonstrate that failure to send home notes in any way impacted Student's
15 ability to benefit from the Intensive Intervention Services Pilot Program.

16 Similarly, Petitioners attempted to establish that communication between the
17 Parents and home program staff was inadequate. Particularly, there is no evidence that
18 quarterly progress reports were given to the parents.¹⁵ [D-193-201] However, Parents
19 did attend the monthly clinics where the same or similar information was discussed with
20 the parents. [Testimony of Home Case Supervisor] In addition, the record does indicate
21 that Parents were involved in and knowledgeable of the home program (e.g., they
22 worked with the home program staff to create the proper learning environment, they
23 used techniques demonstrated by the home program staff to lessen self-stimulatory
24 behaviors.)

25 The hearing officer is not persuaded that inappropriate teaching methods,
26 humiliation or abuse occurred or caused Student's slow rate of skill acquisition, lack of
27 retention and inconsistent performance. Nor did Petitioners meet their burden of
28 persuading the hearing officer that a few incomplete communication logs affected

¹⁴ The record is clear that Parents were active participants in Student's educational program. Father participated in all IEP team meetings. The parents attended clinics. They worked with the home program staff and implemented strategies shown to them. [Transcript, *passim*]

¹⁵ Receipt of quarterly reports from the home program staff was not an IEP requirement and is not treated by the hearing officer as a possible compliance issue under *Rowley*.

1 Student's ability to benefit in any way. Communication between the home program
2 staff and parents was established.

3 Mother reports that Student has made progress. At home he makes better eye
4 contact, understands play, uses PECS, can verbalize several words and physically direct
5 adults to make his needs known. By using techniques from the Intensive Intervention
6 Program they have reduced his self-stimulatory behavior. The hearing officer notes that
7 Mothers observations are not different from those of school and home program staff.
8 No one denies that Student has made progress. No one denies that Student is capable of
9 acquiring some skills. However, a preponderance of the evidence establishes that
10 Student's acquisition is slow and minimal, and that his performance and retention are
11 inconsistent.

12 The hearing officer agrees with the IEP team decision to terminate Student's
13 Intensive Intervention Services. A preponderance of the evidence leads the hearing
14 officer to the conclusion that both before and after the Intensive Intervention Services
15 were implemented, Student acquired skills at a slow rate, was heavily prompt
16 dependent and retention was inconsistent. Working from the same IEP as the classroom
17 teacher, the Intensive Intervention Services staff saw no greater acquisition in skills than
18 did Teacher, who had worked with Student for three years. A preponderance of the
19 evidence leads the hearing officer to the conclusion that Student did *not* demonstrate the
20 intended boost in skill acquisition that the program is designed to provide. He continues
21 to receive instruction, related services, and supplementary aids and services in the
22 special classroom,¹⁶ and does not need the Intensive Intervention Services Program in
23 order to benefit from his education. ["Notably absent from the language of the statute is
24 any substantive standard prescribing the level of education to be accorded handicapped
25 children." *Rowley*, 458 U.S. at 189. "By passing the Act, Congress sought primarily to
26 make public education available to handicapped children. But in seeking to provide such
27 access to public education, Congress did not impose upon the States any greater

28 ¹⁶ These classroom services supported by the IEP are not in dispute.

1 substantive educational standard than would be necessary to make such access
2 meaningful." *Id.* at 192; and see Gregory K., 811 F.2d, *supra*, at 1314 (The states are
3 obliged to provide 'a basic floor of opportunity' through a program 'individually
4 designed to provide educational benefit to the handicapped child'" quoting Rowley, 458
5 U.S. at 197 n.21, 200-01]

6 The hearing officer understands that Parents view the IEP team's decision as
7 giving up on Student. Parents understandably hope for and believe there will be a
8 break-through. However, as the Lead Interventionist testified, in her experience there is
9 not a "moment" when a child changes, but rather, through repetition sooner or later a
10 child will grasp the concept. The IEP of 2/29/09, without the intensive intervention
11 services, provides a degree of repetition commensurate with Student's needs and
12 abilities. As noted above, a school district is not required under *Rowley* or subsequent
13 decisions to provide students with the best possible education or to maximize their
14 potential. Rather, the standard is an appropriate education, individually determined and
15 reasonably calculated to confer educational benefit. [*Independent School Dist. No. 238 v.*
16 *S.D.*, 948 F. Supp. 860, 885 (D. Minn 1995)(*The law does not demand that a school district cure*
17 *a student's disability but merely requires a program of remediation that allows the child to learn*)]
18 CCSD's offer meets this standard.

19 The hearing officer concludes that CCSD's decision to terminate the Intensive
20 Intervention Services was properly based on Student's demonstrated lack of benefit
21 from the program.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28

1 VI. DECISION AND ORDER

2 Petitioners failed to meet their burden of demonstrating that Student needs the
3 Intensive Intervention Services Pilot Program in order to receive educational benefit.

4 Petitioners' claim for relief is denied.

5 It is so ordered.

6 Date: October 6, 2009

7 
Joyce O. Eckrem, Hearing Officer

8
9 APPEAL RIGHTS

10 NAC 388.315. A party may appeal from the decision of a hearing officer made pursuant
11 to NAC 388.310 within 30 days after receiving the decision. A party to the hearing may
12 file a cross appeal within 10 days after he/she receives notice of the initial appeal. If
there is an appeal, a state review officer appointed by the superintendent...shall
conduct an impartial review of the hearing.